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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1968

No.——

WILLIAM P. ROGERS, SECRETARY OF STATE, APPELLANT

v.

ALDO MARIO BELLEI

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the district court granting appellee's motion for summary judgment (App., pp. 17–30, *infra*) are reported at 296 F. Supp. 1247.

JURISDICTION

On May 22, 1969, a three-judge district court entered its judgment (App., p. 31, *infra*) declaring that Section 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401(b), is unconstitutional. A notice of appeal was filed in the district court on May 23, 1969. Jurisdiction over this direct appeal is conferred by 28 U.S.C. 1253, which authorizes any party to take a direct appeal from a decision granting or denying an injunction in a proceeding required by 28 U.S.C. 2282 to have been heard and determined by a district

court composed of three judges, *Schneider* v. *Rusk,* 372 U.S. 224, 225; *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 152–155, *Schneider* v. *Rusk,* 377 U.S. 163, 165; *Zemel* v. *Rusk,* 381 U.S. 1, 5–7. Direct appellate jurisdiction alternatively rests on 28 U.S.C. 1252, because an Act of Congress has been held unconstitutional in a civil proceeding to which an officer of the United States is a party. See *Katzenbach* v. *McClung,* 379 U.S. 294, 295–296; *Rusk* v. *Cort,* 369 U.S. 367, 370–371 n. 4; *United States* v. *Raines,* 362 U.S 17, 20.

QUESTION PRESENTED

Whether either the Due Process Clause of the Fifth Amendment or the Citizenship Clause of the Fourteenth Amendment deprives Congress of the power to attach to the statutory grant of citizenship to a person born abroad of one citizen-parent the condition subsequent that, in order to retain such citizenship, he must come to this country and live here for five years before attaining the age of twenty-eight.

STATUTES INVOLVED

Section 1993 of the Revised Statutes, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, provided:

> Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided

in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.

Section 301 of the Immigration and Nationality Act, 8 U.S.C. 1401, provides in pertinent part:

(a) The following shall be nationals and citizens of the United States at birth:

* * * * *

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the

United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[s] for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: *Provided,* however, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born aboard subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

STATEMENT

Appellee, Aldo Mario Bellei, filed this action against the Secretary of the State seeking declaratory and injunctive relief against the operation of Section 301(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1401(b), on the ground the section's provision for loss of citizenship is unconstitutional.[1] The facts were stipulated, and the prop-

[1] The action was originally filed in the United States District Court for the Southern District of New York, but because venue was not proper there, see 28 U.S.C. 1391(e), the suit was transferred to the District Court for the District of Columbia pursuant to 28 U.S.C. 1406(a).

erly convened three-judge district court granted appellee's motion for summary judgment, holding the statute void and confirming his continued American citizenship (see Appendix, pp. 17–31, *infra.*).

1. Appellee's father has always been a citizen of Italy and never acquired United States citizenship. His mother was born in the United States and has always been, by American law, an American citizen. A few days after his parents' marriage in the United States on March 14, 1939, they left for Italy, where appellee was born on December 22, 1939. The family has since resided there.

At the time of his birth in Italy appellee became, and still is, a citizen of Italy. Under the terms of Section 1993 of the Revised Statutes, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, he also acquired United States citizenship at his birth abroad to an American citizen. That statute also provided, however, that in order to retain the United States citizenship acquired under such circumstances, he had to come to the United States and reside here for at least five years immediately prior to his eighteenth birthday and take an oath of allegiance to the United States after he reached the age of twenty-one. These requirements were liberalized somewhat by the Nationality Act of 1940 (see Section 201(g), 54 Stat. 1139), and were further relaxed by Section 301(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1401(b), which specifies that for a person born abroad to one American parent after May 24, 1934 (see Section 301(c)) all he need do to retain the citizenship conferred on him is to reside in the United

States for five continuous years some time between his fourteenth and twenty-eighth birthdays.[2]

2. For most of his life appellee lived in Italy, the country of his birth. Recently he took up residence in England. Although he has come to the United States on five brief visits, appellee has never established residence in this country. Therefore he admittedly failed to comply with the conditions for retention of his American citizenship as prescribed in the 1934 Act which conferred American citizenship on him, or with the more generous provisions of subsequent statutes.

On his first two trips to the United States, in 1948 and 1951, appellee traveled on his mother's American passport. On his next trips in 1955 and 1962, he traveled on his own United States passport, which was periodically renewed until December 22, 1962, his twenty-third birthday. In connection with the last two renewals of his passport, he was expressly advised of the need to establish residence in the United States prior to his twenty-third birthday if he wished to retain the United States citizenship he had acquired at his birth in Italy. When he failed to do so, the Department of State notified him that he had lost his United States citizenship. Thereafter he used his Italian passport in 1965, when he was admitted to the United States as an alien visitor.

3. In this suit appellee contended that the conditions for retention of his citizenship prescribed by Section 301(b) of the Immigration and Nationality Act are

[2] Absences from the country for an aggregate of less than twelve months do not break the continuity of the five-year residence required. See 8 U.S.C. 1401b.

unconstitutional, and therefore that he had not lost his citizenship. On February 28, 1969, a three-judge district court granted appellee's motion for summary judgment, finding Section 301(b) invalid under the authority of *Afroyim* v. *Rusk*, 387 U.S. 253, and *Schneider* v. *Rusk*, 377 U.S. 163.

THE QUESTION IS SUBSTANTIAL

The decision below, invalidating the conditions on which Congress elected to bestow American citizenship on children born abroad to one citizen and one alien parent, manifestly involves a question of considerable importance. An authoritative ruling by this Court on the constitutional question involved would clarify the citizenship status of many persons in a situation similar to appellee's.[3] In addition, a decision

[3] We are informed that during fiscal years 1964–1968, the Department of State found that 661 persons had lost their United States citizenship under Section 301(b). The Immigration and Naturalization Service has under consideration about 25 cases in which possible loss of United States citizenship under that section is involved. The Department of State has no precise figures but estimates that several hundred such cases are pending throughout the world in the various consular offices of the United States. This issue is also in litigation in a case pending in the federal court in California, *Vincente Gonzales-Gomez* v. *Immigration & Naturalization Service*, E.D. Calif., Civ. No. F–151.

In response to requests by the Department of State and the Immigration and Naturalization Service for guidelines to be followed in light of *Afroyim*, the Attorney General on January 18, 1969, issued a Statement of Interpretation which was expressly made inapplicable to loss of citizenship under Section 301(b), here involved. 34 Fed Reg. 1079 (1969). The Statement also notes that the "ultimate determination" of the effect of the broad language in *Afroyim* must be left to the courts.

by this Court in the present case could significantly affect resolution of the citizenship status of several thousand persons whose cases arise under other sections of the statute and are presently under consideration by the Department of State and the Immigration and Naturalization Service. In our view, the ruling below is erroneous; at the least, it presents a substantial question.

1. The court below rested its decision primarily on *Afroyim* v. *Rusk*, 387 U.S. 253, but that reliance was misplaced. The first clause of the Fourteenth Amendment declares that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States * * *." *Afroyim* involved a naturalized American citizen who traced his citizenship to this constitutional clause, and the Court phrased the issue before it as

> whether Congress can consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. [387 U.S. at 256.]

The Court resolved this question by explaining that

> [t]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, *this Fourteenth Amendment citizenship* was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit. [387 U.S. at 262; emphasis added.]

But the present case does not involve a category of United States citizenship guaranteed and pro-

tected by the Fourteenth Amendment, for appellee was neither "born [n]or naturalized in the United States." Rather, his citizenship is traceable to a grant which Congress was free to confer or withhold at will. Indeed, citizenship like this has long been recognized as attaching only whenever, and on whatever conditions, Congress has from time to time elected to confer it. As the Court explained in *United States* v. *Wong Kim Ark*, 169 U.S. 649, 688:

> This sentence [the citizenship clause] of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed—"born in the United States," "naturalized in the United States", and "subject to the jurisdiction thereof"—in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents: and has left that subject to be regulated, as it always has been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.

As an illustration of the complete dependence of extraterritorial citizenship upon congressional choice, it is generally believed that through legislative oversight children born abroad to American parents between 1802 and 1855 acquired United States citizenship only if their parents were born or naturalized in the United States prior to 1802. See *United States* v. *Wong Kim Ark, supra,* 169 U.S. at 673–674;

Weedin v. *Chin Bow,* 274 U.S. 657, 663; *Montana* v. *Kennedy,* 366 U.S. 308, 311. So also, at no time until 1934 could a child born abroad acquire American citizenship at birth unless his *father* was a United States citizen. And, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, allowing American mothers equal capacity to transmit citizenship,[4] Section 1993 of the Revised Statutes "provided the sole source of inherited citizenship status for foreign born children." *Montana* v. *Kennedy, supra,* 366 U.S. at 312. Thus, had appellee been born six years earlier, he would have had no claim at all to American citizenship. Since appellee acquired United States citizenship when born to an American mother and an alien father outside this country only by reason of this amended *statute,* the decision in *Afroyim,* dealing with constitutional citizenship, cannot properly be said to have resolved the issue presented in this case, namely, whether Congress may attach a reasonable condition subsequent governing retention of the citizenship conferred by the statute and not dependent on the Fourteenth Amendment.[5]

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[4] See S. Rep. No. 865, 73d Cong. 2d Sess., pp. 1–2 (1934); H. Rep. No. 131, 73d Cong., 1st Sess., p. 2 (1933).

[5] We also note that *Afroyim* was expressly concerned with Congress's power to "expatriate" American citizens against their will. Unlike the various grounds for expatriation set forth in Section 349 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1481, involved in *Afroyim* and the other cases which had "consistently invalidated" these provisions "on a case-by-case basis", 387 U.S. at 255, the provision before the Court in the instant case, Section 301(b), contains a condition directly annexed to the grant of citizenship itself, providing that the citizenship so conferred will expire unless perfected

2. The other decision relied on by the district court was *Schneider* v. *Rusk,* 377 U.S. 163. But *Schneider* does not warrant the result reached below. In that case, the Court held that equal-protection principles implicit in the Due Process Clause of the Fifth Amendment prevented *unreasonable* discrimination against naturalized citizens, denying them equal treatment with the native born. But if the apparent per-se rule established in *Afroyim* does not apply in this case, where Fourteenth Amendment citizenship is not involved, the general test of reasonableness (applied in *Schneider*) becomes the controlling standard for gauging the validity of what Congress has done. Since Section 301(b) is in accordance with due process requirements it should have been sustained.

Even the district court agreed that Section 301(b) is not unreasonable or discriminatory, but merely reflects a "legitimate concern of Congress" and represents a narrowly drawn response to "an undeniable danger" (App., pp. 27–28, *infra*). It refused to sustain the statute, despite these critical concessions, only because of its view, undoubtedly colored by reliance on *Afroyim,* that "Congress may not proceed by granting citizenship, and then either qualifying the grant by creating a second class citizenship or terminating the grant." (App., p. 28, *infra*). In adopting this approach, the court below failed to attribute proper weight to the historical development of the

within a certain period. We question whether appellee can be heard to claim the citizenship that has been conferred on him while at the same time repudiating the conditions on which Congress saw fit to grant it.

congressional policy of granting citizenship at birth abroad and the effect of conditioning such a grant upon fulfillment of a reasonable domestic residence requirement.

Congress has always prescribed conditions circumscribing the acquisition of United States citizenship by children born abroad to American parents.[6] The first such statute specified that "the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Section 1, Act of March 26, 1790, 1 Stat. 103. Similar conditions have appeared in every subsequent statute dealing with this subject, including Section 1993 of the Revised Statutes.

In 1927, this Court ruled that under R.S. 1993, citizenship could be transmitted to a child born abroad only if the citizen-father had resided in the United States *prior* to the child's birth. *Weedin* v. *Chin Bow*, 274 U.S. 657; see, also, *D'Alessio* v. *Lehmann*, 289 F. 2d 317 (C.A. 6), certiorari denied, 368 U.S. 822. In settling on this construction, the Court explained that a contrary interpretation, awarding citizenship to a child whose father did not take up residence in the United States until after the child's birth, would

> extend citizenship to a generation whose birth, minority and majority, whose education, and whose family life, have all been out of the United States and naturally within the civilization and environment of an alien country. The beneficiaries would have evaded the duties and

[6] The ancestor British statutes included similar reservations. See *Weedin* v. *Chin Bow*, 274 U.S. 657, 661.

> responsibilities of American citizenship. * * * [274 U.S. at 667.][7]

When Congress in 1934 decided to create American citizenship for children born overseas of an American mother, similar considerations were seen as justifying a conditional grant. The legislative judgment proceeded on the wholly reasonable premise that such children should be treated differently from those born abroad *both* of whose parents were United States citizens, for "such persons are likely, as a rule, to bring up their children as Americans, to see that they speak the English language, and to have them imbued with American ideals." *Report by the Secretary of State, the Attorney General, and the Secretary of Labor on Revision and Codification of the Nationality Laws of the United States*, House Immigration and Naturalization Committee Print, 76th Cong., 1st Sess., Part I, p. 14 (1938) (hereafter "Nationality Laws Revision"); see, also, S. Rep. No. 2150, 76th Cong., 3d Sess., p. 4 (1940). As the court below itself remarked:

> There is an undeniable danger that children, born and raised abroad, in a foreign home, where English may never be spoken, schooled where English is not taught, celebrating foreign holidays with the family of the non-American parent, will have no meaningful connection with the United States, its culture or

[7] Later statutes have removed the ambiguity in *Chin Bow*, and now specify that any requisite prior residence of the parent must precede the child's birth. See Section 301(a) (3), (4), (5), (7), Immigration and Nationality Act, 8 U.S.C. 1401(a) (3), (4), (5), (7).

> heritage. It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States. * * * [App., pp. 27–28, *infra*].

This is precisely the situation in the present case, where appellee, now almost 30 years old, has been in the country only on five brief visits and has never lived here.[8]

3. It is true that prior to 1934 the prescribed conditions related only to the status of the parents and were conditions *precedent* to the attachment of citizenship status. The conditions for retention of American citizenship by a child born abroad to a single citizen parent, prescribed by the 1934 Act and later statutes, can be regarded as conditions subsequent. See 38 Ops. Att'y Gen. 10, 17–18 (1934); Nationality Laws Revision, *supra*, p. 9. The district court thought this distinction critical, suggesting that while Congress could assure some meaningful relationship with this country by deferring the vesting of citizenship in categories not controlled by the Fourteenth Amendment, it could not confer it immediately, subject to reasonable conditions. But it seems to us that where the availability of citizenship itself turns on legislative grant, if Congress has power to condition its acquisition on compliance with certain requirements, as it concededly does, there is no basis for denying power to condition *retention* of the citizenship on the

[8] There is no contention that appellee's failure to comply with the conditions imposed upon the grant of citizenship was due to ignorance or mistake. It was stipulated that he was warned several times of the need to begin residence in the United States no later than his twenty-third birthday.

identical terms, especially when the appropriate condition is one which gives the affected person ample time to make an election after he reaches maturity.

What is more, the result decreed below would compel Congress to adopt a less generous policy than has benefited appellee, if it wishes to preserve the assurances of a nexus with this country that have characterized the statutes on this subject since 1790. The 1934 amendment provided that "the rights of citizenship shall not descend" until the child established the requisite residence in the United States, but the Attorney General promptly construed this language liberally in favor of the foreign born child, holding that citizenship attached immediately, "subject to being divested" if the prescribed residence requirement is not established. 38 Ops. Att'y Gen. 10, 18 (1934). The 1940 and 1952 Acts explicitly confirmed that Congress preferred to confer citizenship immediately at birth, *but* on the assumption—constitutional, we believe—that the citizenship would expire if not perfected by fulfilling the subsequent residence conditions.[9] There is considerable doubt, in light of this historic policy, whether Congress would have chosen to extend American citizenship to appellee and others in his class if it was unable validly to impose the conditions which were regarded as intimate and unseverable concomitants of the grant.

There is no warrant for invalidating the benign flexibility Congress has shown. Certainly the prior decisions of this Court do not inflexibly require that

[9] See H. Rep. No. 1365, 82d Cong., 2d Sess., p. 76 (1952).

Congress must choose solely between the stark extremes of conferring unconditional United States citizenship at birth on a person who may never have any contact with American institutions and ideals or deferring all the privileges of American citizenship until the foreign-born person reaches, for instance, his twenty-eighth birthday, as would be required under a statute like the present one.

CONCLUSION

It is therefore respectfully submitted that probable jurisdiction should be noted.

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MAY 1969.

APPENDIX

United States District Court for the

District of Columbia

Civil Action No. 3002–67

ALDO MARIO BELLEI, PLAINTIFF

v.

DEAN RUSK, SECRETARY OF STATE OF THE UNITED STATES OF AMERICA, DEFENDANT

Before WRIGHT and LEVENTHAL, *Circuit Judges*, and SMITH, *District Judge*.

LEVENTHAL, *Circuit Judge*. Plaintiff, Aldo Mario Bellei, is a citizen of the United States by virtue of section 301(a)(7) of the Immigration and Nationality Act of 1952. That section confers American citizenship on children born of at least one American parent, even though such child is born outside of the United States.[1] Plaintiff brought this action against

[1] 8 U.S.C. § 1401(a)(7), as amended (Supp. III, 1968):

> (a) The following shall be nationals and citizens of the United States at birth:
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> * * * * *
>
> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years * * *.

the Secretary of State to enjoin enforcement of section 301(b) of the 1952 Act, which if operative would terminate his American citizenship. Subsection (b) of § 301 places a limitation on the grant of citizenship made by section 301(a)(7) by making retention of American citizenship conditional upon completing a term of five years residence in the United States before age twenty-eight.[2] We hold that this section violates the requirements of the due process clause of the Fifth Amendment.

[2] 8 U.S.C. § 1401(b) (1964). This provision requires that such child spend at least five years in this country between the ages of fourteen and twenty-eight:

> (b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State [sic] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

The "continuous" presence requirement of section 1401(b) was liberalized in 1957, 71 Stat. 644 (1957), 8 U.S.C. 1401b (1964):

> In the administration of section 1401(b) of this title, absences from the United States of less than twelve months in the aggregate, during the period for which continuous physical presence in the United States is required, shall not be considered to break the continuity of such physical presence.

When Congress originally included this requirement in 1934, it required five years residence before the child reached age eighteen. *See* 48 Stat. 797. The 1940 reenactment was more generous, *see* 54 Stat. 1138–39, and the present law is even less strict, allowing the child until age twenty-eight to complete his five years of residence.

I

The pertinent facts have been stipulated. Plaintiff was born in Italy in December, 1939, of an Italian-born father and an American-born mother. Plaintiff's parents have always been and continue to be citizens of their respective native lands.

Plaintiff, from birth, has been treated as an American citizen by the United States Government. He has been welcomed to this country without visas or other immigration papers required of foreigners. He has availed himself of his unlimited access to come to this country on several occasions and to visit with his mother's family. Plaintiff has also traveled at all times under American diplomatic protection. On his first two visits Bellei traveled on his mother's American passport. On the last two occasions when plaintiff visited the United States, he journeyed under his own American passport, which had been issued in 1952 and periodically renewed until 1964. He was subject to the military service laws and he registered for the draft in 1960.[3]

This controversy arises out of the State Department's refusal to extend or renew plaintiff's passport. When plaintiff sought to have his passport renewed in 1964, the Department denied his request. In 1961 the passport renewal office had noted on plaintiff's passport, "Warned abt. 301(b)." Plaintiff, after that warning, sought renewal in January, 1963, stating in his application that he resided in Havertown, Pennsylvania, giving his occupation as student, and indicating that he intended to remain abroad only three

[3] His scheduled induction in 1963 was deferred because of his employment with a NATO defense program.

months. His application was granted, but the passport was validated only through July, 1963. At the time of this renewal plaintiff was twenty-three years old.

In July, 1963, plaintiff applied through the United States Embassy in Italy for a further extension. Again his request was honored, but he was reminded that he would no longer be considered a citizen, in view of section 301(b), if he remained abroad. The extension expired as of February 11, 1964. When plaintiff failed to return to this country prior to that date, the Department of State concluded that he was no longer a United States citizen, and he was orally informed of that conclusion by the American Embassy at Rome. His passport was accordingly deemed revoked. On February 14, plaintiff was also notified by the United States Selective Service that his liability for military service had terminated in view of his loss of citizenship. At that time plaintiff was over twenty-four years of age. Since 1964, plaintiff has again applied for an American passport and has had his request turned down by a formal letter from the American consul in Italy.[4]

Plaintiff contends that enforcement of section 301 (b) is contrary to the Fifth, Eighth, and Ninth

[4] We reproduce here the letter from the American consul:

> In reply to your verbal request for the issuance of an American passport in your name, your request is hereby denied since you no longer hold American nationality. This action is based on an instruction from the Department of State to this Embassy on September 1, 1964, in which the Department held that you had lost American nationality as of February 12, 1964, by your failure to be physically present in the United States for a period of five years between your fourteenth and twentythird [sic] birthdays, as required by Section 301(b) of the Immigration and Nationality Act as amended by Section 16 of the Act approved on September 11, 1957.

Amendments to the Constitution. A three-judge court has been convened since the constitutionality of a federal law is drawn into question by this litigation.[5]

II

Plaintiff contends that section 301(b) operates to strip a citizen of his citizenship and rests his case primarily on the pillar of due process which has become a bulwark for the protection of citizenship in recent Supreme Court decisions. *See Afroyim* v. *Rusk,* 387 U.S. 253 (1967); *Schneider* v. *Rusk,* 377 U.S. 163 (1964). While the facts of both cases are distinguishable, we think the *Afroyim* and *Schneider* opinions do stand for the proposition that in the absence of fraud Congress may not withdraw a citizenship, whether acquired at birth or by subsequent grant, that is not voluntarily renounced.[6] The position urged by the Government would require us to accord a "niggardly" reading that we think is incompatible with the broad and forceful position put forward by the Supreme Court to protect an important constitutional right. *Cf. Ullman* v. *United States,* 350 U.S. 422, 426 (1956).

We turn first to *Schneider* v. *Rusk, supra.*[7] That case involved a statutory provision which provided:

> (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided

[5] 28 U.S.C. § 2282 (1964).

[6] The exception for the person who has acquired his citizenship by fraud is noted in Afroyim v. Rusk, 387 U.S. 253, 267 n. 23 (1967).

[7] 377 U.S. 163 (1964).

> in section 353 of this title, whether such residence commenced before or after the effective date of this Act * * *. Section 352, Immigration and Nationality Act of 1952, 66 Stat. 163, 269, 8 U.S.C. §§ 1101, 1484.

In holding that Congress could not constitutionally restrict the freedom of naturalized citizens to reside abroad in their native lands the Court said:

> A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons. 377 U.S. at 168–69.[8]

The Supreme Court's broad approach emerged even more clearly with *Afroyim* v. *Rusk*,[9] where the Court held that Congress could not take away citizenship from one who has not voluntarily relinquished it. The significance of *Afroyim* is illuminated by the fact that previously, following *Perez* v. *Brownell*, 356 U.S. 44 (1958), the Court had, in Justice Black's words "consistently invalidated on a case-by-case basis various other statutory provisions providing for involuntary expatriation. It has done so on various grounds and

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[8] *Compare* the 1940 enactment, 54 Stat. 1139, of what is now section 301, dropped over protest in 1952 (*see* 98 Cong. Rec. 5785, 82d Cong., 2d Sess. 1952), providing specially for children whose American parent was engaged abroad on American-related business.

[9] 387 U.S. 253 (1967).

has refused to hold that citizens can be expatriated without their voluntary renunciation of citizenship." In *Afroyim* the Court overruled *Perez,* discarded the case-by-case approach, and sounded a general theme that was contrary to the previously stated assumption that Congress had the power to expatriate citizens in certain circumstances.

> Citizenship is no light trifle * * *. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect *every* citizen of this Nation against forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship. 387 U.S. at 267–68. (Emphasis added.)

Section 301(a)(7) by its terms confers citizenship at birth.[10] Persons in plaintiff's situation are endowed at

[10] The predecessor to section 301, § 1993 Revised Statutes, left open the question of whether the child beneficiary acquired citizenship at birth, or only upon compliance with conditions of declaring an intention to become a resident and taking an oath of allegiance required by section 6, Act of March 12, 1907, 34 Stat. 1228, 1229. The 1934 Act substituted the requirement of presence in the United States which is the forerunner of subsection (b). While the floor debates on the 1934 Act suggested that it was necessary to comply with the requirements of residence before citizenship could attach, the Attorney General in a contemporaneous construction concluded that the Act conferred citizenship at birth. *See* 38 Ops. Att'y. Gen'l. 10, 16–18 (1934); *see also* Weedin v. Chin Bow, 274 U.S. 657, 675 (1927), concluding, by implication, that the benefit of citizenship under the 1855 Act attached at birth.

birth with American citizenship and all its incidents and they enjoy its benefits during their formative years. The provisions of subsection (b) would operate to terminate the citizenship status for those persons, previously recognized as citizens, who do not take the steps set forth in (b). While plaintiff did not take up residence in this country in 1963, as provided by section 301(b), he had declared his intention to do so. During this period of citizenship, he was subject to American jurisdiction as a citizen [11] and also subject to other duties of citizenship such as military service. Now he is independent of youthful ties to family and wants to come to the United States. In view of the prior grant of citizenship to plaintiff we do not think Congress can now slam the door in his face. Whatever the reason plaintiff remained abroad, family ties or schooling, Congress cannot terminate his citizenship on the ground that he only enjoyed a second-class citizenship, one that restricted his "rights to live and work abroad in a way that other citizens may." This is contrary to *Schneider* and *Afroyim*.

III

The Government relies on the fact that *Schneider* and *Afroyim* protected plaintiffs who traced their citizenship to naturalization. It is argued that the Fourteenth Amendment's due process clause guards only that citizenship that is constitutionally conferred, citizenship acquired by birth in the United States or by naturalization, and is inapplicable to citizenship conferred by a statute that is not an act of naturalization. We see no basis for the distinction. It may be that there is more than one Constitutional source of Congressional authority to grant and define citizen-

[11] Blackmer v. United States, 281 U.S. 432 (1932).

ship, that there is power deriving from the naturalization clause, Act I, § 8, cl. 4, and also authority [12] deriving from implied powers of Congress.[13] In any event, however, the recognition or grant of U.S. citizenship is lawful only because this is within the power of Congress under the Constitution.

We see no basis for concluding that the Supreme Court was declaring a due process protection to citizenship granted by a naturalization act that did not extend to citizenship granted by another act.[14]

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[12] What appears to be the earliest ancestor of section 301(a) is the Act of March 26, 1790, 1 stat. 103, 104, which was an Act to establish a uniform rule of naturalization. *See* n. 16, infra.

[13] Article I, § 8 authorizes Congress "to establish a uniform Rule of Naturalization." We need not here decide whether there exists an implied power in foreign relations that would justify legislation like that before us. *See* Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations, 107 U. Pa. L. Rev. 903 (1959). Other possibilities exist for justifying congressional legislation to define citizenship. The term "naturalization" appears in the text of the Constitution without definition. The need for explication may well serve to sustain legislation. *Compare* Katzenbach v. Morgan, 384 U.S. 641 (1966).

[14] We do not think a contrary view was intended by Justice Black's majority opinion in *Afroyim*, that

> the [Fourteenth] Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit. 387 U.S. at 262.

See also Justice Warren's dissent in Perez v. Brownell:

> The Government is without power to take citizenship away from a native-born or lawfully naturalized American. The Fourteenth Amendment recognizes that this

The Government argues in the alternative that even if congressional power to enact conditions on citizenship is limited by due process, section 301(b) contains reasonable conditions and is, therefore, constitutional. It is urged that section 301(b) is simply a reasonable way of assuring that children of hybrid origin give some affirmative indication of desiring to be part of our society as well as avail themselves of our protection and the opportunity to come to this country whenever it proves expedient.[15] Our attention is directed to the background and legislative history of section 301 which, according to the Government, reveals that the purpose of subsection (b) of § 301 is to assure that these children of mixed allegiance have some

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priceless right is immune from the exercise of arbitrary governmental powers.

356 U.S. at 77–78.

It is hardly consistent with the farreaching holding of *Afroyim* to attribute to Justice Black's language an intention to leave unprotected a broad class of citizens. The holding is cast in broad terms and draws no distinction among types of citizenship. *See* Afroyim v. Rusk, 387 U.S. at 267–68. Moreover, there is no reason to believe that Justice Black meant to vary settled doctrine that due process protects persons.

[15] *Compare* Perkins v. Elg, 307 U.S. 325 (1939), approving by implication an election requirement for persons who bear dual citizenship; *see also* Savorgnan v. United States, 338 U.S. 491 (1950), holding that voluntary naturalization in a foreign state is a valid basis for expatriating an American citizen, even though there was no desire or intention or awareness that the act of naturalization would operate to divest citizenship. For a discussion of problems arising out of dual nationality, *see generally* Scharf, A Study of the Law of Expatriation, 38 St. Johns L. Rev. 251, 271–75 (1964).

connection to the state that is offering them its protection and other benefits of citizenship.[16]

The Government's contention is not without appeal, and we have pondered the matter carefully. There is an undeniable danger that children, born and raised abroad, in a foreign home, where English may never

[16] Section 301 can be traced to early legislation, dating back to the infancy of the Republic. As early as 1790 Congress provided for the transmission of citizenship by descent. The first such statute was framed as a limitation. "[T]he right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Section 1, Act of March 26, 1790, 1 Stat. 103, 104. That section was reenacted and finally codified as § 1993 of Revised Statutes. The 1855 Act was a response to an 1854 article, criticizing the earlier formulations for not providing citizenship for those children of American paternity who were born abroad. *See* Binney, 2 Amer. Law Reg. 193; *see also* 2 Kent Commentaries 14. In 1934 Congress eliminated the obvious inequity of extending the benefit of citizenship to only those children with paternal ties to the United States. *See* 78 Cong. Rec. 7344 (73rd Cong., 2d Sess.). At this juncture Congress also included the five years presence requirement which is now section (b) of the statute. Sec. 1, Act of May 24, 1934, 48 Stat. 797.

The forerunner of subsection (b) was Section 6, Act of March 12, 1907, 34 Stat. 1228–29, which provided:

> That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

be spoken, schooled where English is not taught, celebrating foreign holidays with the family of the non-American parent, will have no meaningful connection with the United States, its culture or heritage. It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States.[17] We hold only that Congress may not proceed by granting citizenship, and then either qualifying the grant by creating a second class citizenship or terminating the grant.[18] The broad teaching of *Afroyim* and *Schneider* is that once American citizenship has been recognized or

[17] We recognize that "jus sanguinis" may provide a tenuous link to the national state when citizenship is conferred by virtue of the citizenship of only one parent. Yet we are not confronted with the specter of generations of child emigres who will return to this country to claim citizenship. Section 301(a)(7) itself requires that a parent have lived in the United States ten years as a prerequisite to transmitting citizenship to a foreign-born child.

[18] After argument was heard in this case the Attorney General promulgated a Department ruling setting forth the procedure that would be followed in expatriation cases after Afroyim v. Rusk. The gist of the memorandum is that each case will be taken on an individual basis to ascertain whether the individual involved actually intended to relinquish his American citizenship, assuming he puts the question of intent at issue. Since the new procedure "does not necessarily apply to the loss of U.S. citizenship acquired as a result of birth abroad to a citizen parent or parents," we have no occasion to consider the legal significance or soundness of the Department ruling, which appears at 34 Fed. Reg. 1079 (January 23, 1969).

conferred, Congress may not remove the status; it is for the citizen to abandon his citizenship voluntarily.

Plaintiff's motion for summary judgment is granted: Defendant's cross-motion is denied.

s/ J. Skelly Wright,
J. SKELLY WRIGHT,
United States Circuit Judge.

s/ Harold Leventhal,
HAROLD LEVENTHAL,
United States Circuit Judge.

s/ John Lewis Smith, Jr.,
JOHN LEWIS SMITH, Jr.,
United States District Judge.

WASHINGTON, D.C.,
February 28, 1969.

LEVENTHAL, *Circuit Judge,* concurring. I add to the opinion I have written for the court a few words that help me place this case in perspective.

We did not have before us in this case a statute that set conditions as a prerequisite for the grant of citizenship. Therefore we did not have occasion to consider to what extent Congress could impose such conditions and what kind of conditions, if any, it could impose. My own assumption is that Congress can impose reasonable conditions that must be met before citizenship is recognized.[1] But that is not the course that Congress wanted to follow here. It wanted the

[1] While Congress would have wide latitude in drafting a condition precedent to its grant of citizenship, such conditions would have to comply with the fundamental requirements of equal protection and due process. *Compare* French, Unconstitutional Conditions: An Analysis, 50 Geo. L. J. 234 (1961).

child beneficiary governed by § 301(a)(7) to be a citizen at birth, with advantages of United States diplomatic protection and other benefits of citizenship, and perhaps with the corollary opportunity to resist citizenship claims of other countries.[2]

Nor were we required to consider a statute in which residence abroad was not established as an operative fact terminating citizenship, but was given significance only as an evidentiary fact indicative of a voluntary relinquishment of citizenship.[3]

s/ Harold Leventhal,
HAROLD LEVENTHAL,
United States Circuit Judge.

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[2] *See* Borchard, Diplomatic Protection of Citizens Abroad § 200, at 462.

[3] *Compare* Chief Justice Warren's dissent in Perez v. Brownell, which states that "certain voluntary conduct results in an impairment of the status of citizenship," 356 U.S. at 69, and that "United States citizenship can be abandoned, temporarily or permanently, by conduct showing a voluntary transfer of allegiance to another country." 356 U.S. at 73; *compare also* Justice Black's concurring opinion in Nishikawa v. Dulles, 356 U.S. 129, 139 (1958), where he noted, "Although Congress may provide rules of evidence for [determining when there has been voluntary relinquishment], it cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces, establishes a conclusive presumption of intention to throw off American nationality. [Citation omitted.] Of course such conduct may be highly persuasive evidence in the particular case of a purpose to abandon citizenship."

JUDGMENT

Bellei v. Rusk, Secretary of States [*sic*]
Civ. Act. 3002–67

In accordance with our memorandum opinion and order of February 28, 1969, it is hereby adjudged, declared, and decreed:

(1) That Section 301(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1401(b), is unconstitutional; and,

(2) That plaintiff is a citizen of the United States and is entitled to all the rights and privileges appertaining to a citizen of the United States.

s/J. Skelly Wright
J. SKELLY WRIGHT,
United States Circuit Judge.

s/Harold Leventhal
HAROLD LEVENTHAL,
United States Circuit Judge.

s/John Lewis Smith, Jr.
JOHN LEWIS SMITH, Jr.,
United States District Judge.

WASHINGTON, D.C.

May 22, 1969.

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